

# WHOSE LAWS ARE THEY ANYWAY?

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Since mid-2009, Canada has been participating in negotiations with the European Union towards an economic partnership agreement known as the Comprehensive Economic and Trade Agreement (CETA). In addition to the strong ties between the EU and Canada as investment partners, the EU is Canada's second-largest export market after the United States, with two-way merchandise trade totalling almost \$91 billion in 2008. A joint study by the EU and Canada indicates that bilateral trade could potentially increase by over 20 percent through the liberalisation of trade between the parties. Accordingly, the intent is to negotiate an 'ambitious' agreement that covers a very broad range of areas, including trade in goods, technical trade barriers, trade facilitation, customs procedures and rules of origin, trade in services, investment, regulatory co-operation, competition policy and intellectual property.

Two formal rounds of negotiations have occurred, in October 2009 in Ottawa and in January 2010 in Brussels. Three further rounds are planned, with the next one originally scheduled to take place in April 2010. The goal is to conclude the agreement this year.

The substance of the negotiations to date has not been widely publicised by Canada's government, despite the important implications for many areas of Canadian law and policy. However, the draft intellectual property chapter of CETA, which includes proposals from both the EU and Canada, has been made available online and is raising concerns in the Canadian IP community insofar as the EU proposals appear to require substantial changes to be made to Canadian intellectual property laws in all areas, including copyright, trademarks, patents, databases and plant variety rights. The sweeping nature of the reforms, including making provisions for a variety of new rights that would have to be implemented by Canada if it were to sign up to the CETA in its current form, have led some commentators to warn that Canada would effectively be relinquishing jurisdiction over its own intellectual property laws if it complies with the EU proposals.

For example, the EU proposals include many major changes in the area of copyright, including extending the term of copyright in Canada from life plus 50 years to life plus 70 years, new resale right for works of art, new exclusive rights for fixation of broadcasts (not limited to wireless broadcasts), new distribution rights, and the extension of reproduction rights to performers and broadcasters. Canada's regime for enforcing IP rights would also require an overhaul to bring it in line with EU law, for example, in the area of Internet service provider (ISP) liability and new criminal sanctions proposed by the EU. With respect to trademarks, changes to the Canadian trademark registration process, the introduction of protection for well-known marks and the requirement that Canada comply with the Trademark Law Treaty (1994), and accede to the Singapore Treaty as well

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as the Madrid Protocol, are also included among the EU proposals. In the area of patents and designs, the EU is seeking to require Canada to comply with Articles 1 to 16 of the Patent Law Treaty (which Canada has signed but not implemented) and to accede to the Hague Agreement Concerning the International Registration of Industrial Designs, in addition to new data protection for plant protection, new rights for registration of designs and further protection regarding disclosure to third parties of pharmaceutical data submitted to regulatory authorities.

Similar concerns have also been raised about the implications of CETA for Canadian cultural policy, not only in areas that intersect directly with intellectual property rights (in particular, copyright), but also on issues such as the right of foreign investors to challenge decisions by governments in Canada, including those affecting culture, and restrictions that limit foreign firms from establishing in Canada or acquiring Canadian companies in film, broadcasting, publishing and the music industries, all of which are also relevant to IP.

The potential commercial benefits to Canada and many sectors of Canadian industry that would result from liberalising trade between the EU and Canada are clearly attractive. However, the cost of strengthening such ties in terms of the impact on intellectual property rights holders in Canada remains to be seen.

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